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No. 84-6558

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

Supreme Court, U.S.
FILED
APR 8 1985
Alexander L. Stevas, Clerk

DARRYL ELROY STEWART,
Petitioner

versus

THE STATE OF TEXAS,
Respondent

ON APPLICATION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS
NO. 68,889

Will Gray
Petitioner's Lawyer
2038 Lexington Street
Houston, Texas 77098
713-759-0585

64 pp

QUESTIONS PRESENTED

Point One

Whether, given the facial narrowness of Article 37.071 (b)(1) and (2), Vernon's Annotated Code of Criminal Procedure, it can be certain that the jury reached its penalty decision with due consideration of the mitigating circumstances proffered by the Petitioner, in viola tion of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Point Two

Whether, under the facts of this case, Article 37.071, V.A.C.C.P., violates the Eighth and Fourteenth Amendments to the Constitution of the United States because it has no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial.

Point Three

Whether the Texas law of parties and of criminal responsibility for the acts of another, as applied to the penalty stage of Petitioner's trial, violated the rationale of Enmund v. Florida, 458 U.S. 782 (1982), and materially reduced the State's burden of proof on the "deliberateness" issue.

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NO_____

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ON APPLICATION FOR WRIT OF CERTIORARI
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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, affirming the Petitioner's conviction for the offense of capital murder and sentence of death, is not yet reported. It was returned September 17, 1984 and Petitioner's motion for leave to file a Motion for Rehearing was denied February 6, 1985. A copy of the opinion is attached as Appendix A, with the Certification of the Clerk of the Court of Criminal Appeals, Appendix B.

JURISDICTION

The jurisdiction of this Court is based on the following:

1. Petitioner's conviction and sentence of death were affirmed by the Court of Criminal Appeals of Texas on September 17, 1984. His motion for leave to file a Motion for Rehearing was denied by the Court on February 6, 1985.

2. Rule 17.1(c), Rules of the Supreme Court. The court below "has decided an important question of federal law which has not been, but should be, settled by this Court, [and] has decided a federal question in a way in conflict with applicable decisions of this Court."

3. 28 United States Code, Section 1257(3): "[W]here the validity * * * of a State statute is drawn in question on the grounds of its being repugnant to the Constitution of the United States * * * [and] where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * [of] the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to have the assistance of Counsel in his defence."

2. Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

3. Fourteenth Amendment:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Darryl Elroy Stewart was convicted of capital murder and the jury's answers to special punishment issues one and two condemned him to death.

THE STATUTES INVOLVED

V.T.C.A. Penal Code, Section 19.03(a)(2) provides the following: (a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and: the person intentionally commits the murder in the course of committing or attempting to commit. . . burglary.

V.T.C.A. Penal Code, Section 19.02(a)(1) specifies that a person commits an offense if he (1) intentionally or knowingly causes the death of an individual. . ."

THE INDICTMENT

The indictment, R. I, 6, charged that the Petitioner, on February 6, 1980, did, while in the course of committing and attempting to commit burglary of a habitation, owned by William E. Melton, intentionally cause the death of Donna Kate Thomas by shooting her with a gun.

Donna Kate Thomas was murdered on February 6, 1980, at 2:30 p.m. She died from two side-by-side gunshots above the right ear, fired from a distance of less than twenty inches. Two spent .25 caliber projectiles were recovered, one from the hair in the area of an exit wound and the other inside the skull. The laboratory tests were negative for spermatozoa. R.V, 1793-1800; 2130-2139. She had $50.00 in her purse before her death. A .22 caliber long-barrel pistol with a magnum cylinder was missing from the Thomas apartment. R. V, 1810-1817.

Edith Felts lived directly above the Thomas apartment. Her six year old daughter and the Thomas' child, Donna Fay, were friends and at various intervals on February 6th, they had played together in the Felts apartment. Later that afternoon, Mrs. Felts heard Donna Fay crying, "Christie, tell your mommy my mommy is killed." Mrs. Felts investigated and found the woman's nude body on the bed, with a pillow over her head. R. V, 1883-1899.

As she was returning to her apartment, Mrs. Felts met a young boy named Michael. She told him, "The lady's dead in there." He said: "Well, there was a man that just ran out of there after you did." R. V, 1904-1906. Mrs. Felts told the police that Michael was right at the bottom of her stairway. He said he saw a big black man, with no shirt on, and a knife in his hand, run from the apartment to apartment 351. R. V, 1910-1914.

Petitioner lived in Apartment 301 with Kathy Stewart; Kevin Kelley lived with Sarah Daniels in Apartment 351. R. V, 1835-1837.

The manager of the apartment complex and a maintenance man both saw the Petitioner and Kelley walking around the complex at various times, before and after the murder on February 6th. R. V, 1846-1848.

Barker, the maintenance man, knew both men. Kelley, who was much bigger than Petitioner, did not have on a shirt. Petitioner wore a white or light-colored tank shirt or body shirt with blue striping. R. V, 1859-1865. After the woman was killed, Barker saw the two men again, between 2:00 and 3:00 p.m. near Petitioner's apartment. Fifteen minutes later he saw Petitioner's car leaving the complex. He could not identify the occupants of the vehicle. R. V, 1864-1871.

Petitioner and Kelley were arrested at 6:15 p.m., and Kelley consented to a search of his apartment where the police found two live .22 caliber rounds behind the sofa, and a box containing 92 live .22 shells in a bedroom closet. R. V, 1986-1996.

Kelley made a written statement in which he said that he had given the murder weapon to Sarah Daniels in a paper bag. He didn't know where she had hidden it. R. V 2000-2001.

At 7:30 a.m. on the 7th, detectives Owen and Kent met Kathy Stewart and Sarah Daniels. Sarah directed them to the hidden weapons, a .22 caliber Colt long barrel pistol, a .25 caliber R. G. automatic pistol, and two .22 caliber shells, wrapped in a towel inside a brown paper bag. R. V 2002-2006. After Kathy gave her consent, Owen and Kent searched Petitioner's apartment and found 21 rounds of .25 caliber ammunition and an instruction pamphlet on an R. G. .25 caliber automatic inside a bureau drawer and one .25 caliber round on the floor. R. V, 2014-2017.

The two spent .25 caliber projectiles recovered from the body of the deceased were fired from a .25 caliber pistol that

Petitioner purchased from pawn broker Maria Hendrix on December 22, 1979. R. V, 2074-2078; 2086-2092.

A trace metal test on Kelley's hands, conducted February 6th, revealed no metal detection pattern consistent with either of the two pistols submitted. The fibers from Kelley's head hair were not similar to hairs taken from the bed, tub, bathroom and pillowcase at the Thomas apartment. R. V 2101-2108. No such test or comparisons were run on Petitioner. R. V 2121.

Petitioner came to Kelley's apartment at 12:30 p.m. February 6th and wanted to borrow some money. Kelley couldn't help him because he had very little money himself. Petitioner talked about pawning something. Then he suggested stealing a television set from a woman who lived in the complex. The men pooled their money and bought a six-pack of beer. They were short .67¢ but the woman let them have the beer anyway. R. V, 2188-2201.

Later, Kelley and Petitioner went to the mailbox, where they saw a woman that Stewart k: w. She usually left her door open. Petitioner had been there earlier, asking about some dope. They went to this woman's apartment, but the door was locked so they walked back toward the swimming pool.

Then Petitioner noticed that the door to apartment 287 was open. Kelley kept walking. He could see a television and stereo set through the open door. Petitioner said he wanted his .25 automatic, which Kelley was holding as security for a $40 loan he had made to Petitioner.

When Kelley asked him what he was going to do with the gun, Petitioner said "he was just going to rush in and hold the gun to the person's face" and he said "something about roosters going to crow." Petitioner was the one who carried the loaded gun when both men returned to apartment 287. Petitioner went inside. "At that particular time [Kelley] was standing from the apartment and [he] had on [his] mind to go to the manager's office and talk to her concerning * * * the wreck [he] had at the apartment complex."

While Petitioner was inside, Kelley "wandered." He was maybe at the next apartment when he heard a woman holler, "Oh my God." He froze and wondered "should I go in or should I run?" He decided to investigate. As he entered the living room, he heard Petitioner "saying for her to take her clothes off." Then he told "her" to get into the closet. Kelley pulled on Petitioner's arm, trying to tell him to come on because "what he was doing didn't need to be done." Petitioner refused and as Kelley started to leave, he turned around and said: "Hold up, you big Mother Fucker," and pointed the gun at him, and ordered him to "see what was there of value in the other bedroom. Kelley found a long barrel .22 pistol and gave it to the Petitioner. R. V 2189-2226.

The front door slammed and Kelley stepped back near the closet in the second bedroom. He couldn't see anything but he heard Petitioner say, "Your mother's here in the closet. Come on and get in with her" to "the little girl." Kelley then saw a little girl as she entered the woman's bedroom. The girl was "back facing" Kelley as she went into the closet and he didn't think she ever saw him. He returned to the first bedroom.

Petitioner pulled the nude woman out of the closet and made her lie down on the foot of bed. He made Kelley sit beside her. He told the woman he wanted to have sex. She asked him not to hurt her or her little girl, and told him that she was having her period. Petitioner became upset and said, "Maybe I ought to get you to suck me." The woman began crying. Petitioner moved to the side of the bed next to the wall and told Kelley to hold her. She was lying down with her legs hanging off the end of the bed. While Kelley held her, Petitioner stuck the gun to her head, put a pillow over it and shot her two or three times. He looked at Kelley with a grin on his face and said, "Look at her kick."

Kelley went back to his apartment and Petitioner got there about five minutes later. R. VI 2226-2237.

Petitioner dropped the .25 caliber pistol on the coffee table and went to the kitchen to wash his hands. Kelley saw

that he had some money, no more than $10. His shirt was unbuttoned and had blood on it and at his request, Kelley gave him a tank top to wear. Petitioner sat on the sofa and brought out the "long pistol." He pulled the magazine pin out and a little round cylinder and about four shells fell to the floor. Kelley wrapped both weapons, the cylinder and the shells in a towel, and put everything in a paper bag, which he stuck behind the sofa. Petitioner asked Kelley, "Did you see her legs kick? Did you see her? Did you see what happened? He had a smile on his face and stated it happened to all people, all white people." R. VI 2239-2244; 2246-2247.

They went to a Dairy Queen where Daniels worked. Kelley ordered a hot dog and Petitioner a large order of french fries. Petitioner talked and joked with a young Spanish girl. Kelley went there so he could tell Daniels what had happened, but he was unable to do so because every time he moved, Petitioner moved. R. VI 2248-2249.

Petitioner decided to pawn a small television set that Kelley had borrowed from him. They left for the pawn shop in Petitioner's car. Petitioner gave Kelley $5.00 to buy beer at the convenience store and pay the lady the money owed from the earlier purchase. They also bought a dollar's worth of gas at an Exxon station. R. VI 2249-2251.

Petitioner pawned the television set at the Circle Pawn Shop for "probably $30.00." The woman there knew the Petitioner and had his identification in her file. This was corroborated by the owner of the pawn shop. R. VI, 2260-2262; V, 2151-2156.

When the two men returned to the apartment complex they saw an ambulance and two police cars. The Petitioner said, "Let's go to Dickinson and see about my dope." This was around 4:00 p.m. R. VI, 2263-2265.

Just before they got to Dickinson, Petitioner almost collided with a car and swerved into a ditch. Kelley wasn't injured in the wreck, just frightened. A deputy sheriff pulled up immediately and Petitioner told him the other driver had

been in the wrong lane and if he saw him, he would kill him. The deputy called a tow truck and it cost Stewart $23 or $27 to get pulled out of the ditch. R. VI 2266-2267. Deputy Sheriff Randall corroborated this testimony. R. V 2172-2179.

They drove to a house where "A Spanish guy was supposed to bring Petitioner some dope * * * and also, in exchange he was supposed to talk about a stereo." The "Spanish guy" never made it. R. VI 2268-2269.

When they got back to Houston about 6:00 p.m. Petitioner let Kelley off at his apartment and told him "to be cool and don't say nothing." Daniels intercepted Kelley as he was walking toward his apartment and told him that two detectives had just been there to talk to him. Kelley went into a state of panic. He gave Daniels the guns and told her to go hide them. Right after she left with the sack of guns, the detectives returned and arrested Kelley. At the police station he gave permission to search his apartment. He was taken upstairs and some tests were run on him. Then detectives Owen and Kent asked him some questions. Kelley decided he would tell what happened, but he asked them to bring his uncle before he said anything. After the uncle arrived Kelley told the police what had happened. R. VI 2269-2277.

Kelley knew that he was charged with the offense of capital murder arising out of the death of Donna Kate Thomas. He and his attorneys had made an agreement with the District Attorney's office concerning his testimony. The agreement was that he would not get more than 50 years in the Texas Department of Corrections. R. VI 2281.

The trial judge found that Donna Fay Thomas was a competent witness when she said that her birthday was on Christmas and that next Christmas she would be five years old. It was wrong to tell a lie and people who do get a spanking. She knew that she lived in Georgia. R. VI, 2346-2349.

Donna Fay testified that she remembered the day the bad man came to her house. She was playing outside that day. She did not see anybody outside before she went in. When she went

in, she went in the closet. Her mama was in the closet. She opened the door to get in the closet. There was one man inside the apartment and he was black. He was "skinny." He had a mustache. She didn't remember if the man or her mama told her anything when she went in the closet. Then her mama left the closet with the man and Donna Faye stayed in the closet by herself. She came out of the closet later and saw her mama on the bed with no clothes on. She didn't say anything to her mama but went upstairs and told her friend's mama that her mama got killed. R. VI 2349-2354.

The State introduced Petitioner's written statement in its entirety. R VI 2357-2368, 2606.

Owen testified that Petitioner, as depicted in a photograph introduced as SX-57, had a thin mustache with an equally thin goatee, sideburns extending down the cheeks and no other facial hair. SX-38, a picture of Kelley, showed that he had a full beard. R. VI 2377-2378. There had been testimony earlier that at the time of his arrest Kelley weighed 267 pounds.

POINT ONE

WHETHER, GIVEN THE FACIAL NARROWNESS OF ARTICLE 37.071(b)(1) and (2), VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE, IT CAN BE CERTAIN THAT THE JURY REACHED ITS PENALTY DECISION WITH DUE CONSIDERATION OF THE MITIGATING CIRCUMSTANCES PROFFERED BY THE PETITIONER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

POINT TWO

WHETHER, UNDER THE FACTS OF THIS CASE, ARTICLE 37.071, V.A.C.C.P., VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT HAS NO PROVISIONS FOR DIRECTING AND INSTRUCTING THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES AT THE PUNISHMENT PHASE OF THE TRIAL.

POINT THREE

WHETHER THE TEXAS LAW OF PARTIES AND OF CRIMINAL RESPONSIBILITY FOR THE ACTS OF ANOTHER, AS APPLIED TO THE PENALTY STAGE OF PETITIONER'S TRIAL, VIOLATED THE RATIONALE OF ENMUND V. FLORIDA, 458 U.S. 782 (1982), AND REDUCED THE STATE'S BURDEN OF PROOF ON THE "DELIBERATENESS" ISSUE.

STATEMENT

The first special interrogatory under Article 37.071(b)(1), Vernon's Ann. Code of Criminal Procedure, is: "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. . ."

Petitioner's written statement was introduced by the State at the guilt phase of the trial. R. VI 2606. There he said the following:

> "We turned right and we passed by the ladies apartment and I saw the door open. I made the comment of why is the door open and at the same time Kevin and me both was looking at the apartment. Kevin said, 'Do you see what I see?' We passed on by and Kevin said lets go back and take another look and I said o'kay. We turned around and went back and looked in the apartment and kevin said there was a chick in there. At the same time I made the comment Suppose her old man is in the apartment. He say I'm going off in there. He saw a stereo he liked and it was up loud. I asked him what are you going to do with the stereo and he said he was gonna take it to the pawn shop. He kept saying that he was go off and get the stereo and I asked him what he could get for it probably no more than forty or fifty bucks.'

"His intention was to run in the apartment while the door was open and snatch the stereo and run out. I told him not to get caught if you go in there and he asked me if I was going to watch out for him and I told him I would. We both preceeded back to the apartment and he went inside and I was standing outside. By the time he got in there to get the stereo the lady had seen him and he started to scream. From the sound I think she was in the hall. I was still outside looking inside and looking outside. I saw him go back where she was and I heard a gasping sound and I heard him tell her to take off her blouse. He was telling her she better not tell anybody. He then told her to pull her pants off and I heard her make the statement that she was in her period. I heard her say something about her daughter was on her way home and not to let her daughter see her like this. The little girl came home and saw me outside there. She went on inside the apartment and I went on to go tell Kevin she was coming and Kevin told me to open the closet door and put the little girl and her mother in there. At this same instant we heard a lot of rumble upstairs and kevin made the statement to her that she was going to do something for me even though you are bleeding. He beckoned for me to go and see what was going on and when I came to see what it was from the end of the hall I saw the legs of the people going upstairs. I came back and he had the woman by the neck and he tossed her over by the bed and he kept telling her bitch you are gonna do something for me before I leave. I'm standing here at the corner of the hall looking for the people

going up and down the stairs to see what they are going to do. At this time I heard Kevin telling her that she was gonna have to do something for me. He was gritting his teeth. At this time I go back in there and I see him standing over her on the bed so he tells me to go back and see if anybody is looking outside. I goes to the hallway and peeps around the corner. The curtains were open. At that time I heard two shots back there and I came up to the door and he was heading out. I say her laying on the bed. We came out of the apartment, I was first and he came behind me. When we were headed back to the apartment he handed me back the gun and told me I could have it and that I didn't owe him nothing on it. He had the pistol wrapped in newspaper. We got to the apartment and he washed the pistol off and gave it to me. I was looking at it and he said lets go to the pawn shop and he took the .25 and put it in his bedroom. I stayed in the living room and when he came back into the living room he had a long barrell .22. He told me that was his ood .22 and then he put it back in the bedroom.

This statement, introduced by the State, raised a number of mitigating factors: (1) Petitioner agreed to serve as a lookout while Kelley ran inside the open door and snatched the stereo; (2) Kelley was the one with the weapon; (3) Petitioner had no intent to kill the deceased and played no active role in her murder; (4) Once inside the apartment, Kelley turned aside from the plan to steal the stereo and undertook to commit a sexual offense against the deceased; (5) during the course of this second offense, certainly one not contemplated by Petitioner, Kelley killed the woman.

RULING OF THE COURT OF CRIMINAL APPEALS

The Court of Criminal Appeals made the following ruling on the interlocking issues here presented:

"In his fifth ground of error, appellant contends that Article 37.071, V.A.C.C.P., violates the Eighth and Fourteenth Amendments of the United States Constitution because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial. Appellant relies upon the United States Supreme Court decisions in Lockett v. Ohio, 438 U.S. 586 (1978); Green v. Georgia, 442 U.S. 95,(1979) and Eddings v. Oklahoma, 455 U.S. 104 (1982). All three of the cases relied upon by appellant concern situations in which the sentencers in a capital case were precluded from considering mitigating evidence in the punishment of each case. To meet constitutional muster, the sentencers in a capital case must be allowed to consider all relevant mitigating evidence. Lockett v. Ohio, supra; Green v. Georgia, supra; Eddings v. Oklahoma, supra; Woodson v. North Carolina, 428 U.S. 280.

"Article 37.071, supra, has previously passed constitutional muster in Jurek v. Texas, 428 U.S. 262 (1976), and Quinones v. State, 592 S.W.2d 933, 947 (Tex.Cr.App.1980), where it was determined that Article 37.071 provides that "in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." Thus, "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a death sentence."

"* * * [W]e held in Quinones v. State, supra, that no jury charge regarding evidence of any mitigating circumstances was necessary since the questions prescribed under Article 37.071 clearly allow the jury to grasp the logical relevance of mitigating evidence. Finally, our review of the record shows that appellant never requested the trial court to charge the jury on mitigation."

"Appellant argues that, since by the time the punishment phase of the trial was reached the jury had alredy found that the defendant acted 'intentionally or knowingly,' the jury was precluded from considering mitigating circumstances when it considered appellant's 'deliberateness' in answering Special Issue No. 1. Further, he argues that in a case such as the instant one, where there was evidence that the defendant was not the triggerman, but the jury was instructed on the law of parties at the guilt-innocence phase, the State's burden of proof on the first punishment issue was materially reduced, and the jury was compelled to view the first punishment question as requiring a 'yes' answer.

"We would note initially that there was conflicting evidence as to whether appellant was the triggerman. Thus, it is very possible that the jury convicted appellant believing that he did kill the victim. Furthermore, we have held that 'deliberately' and 'intentionally or knowingly' are not linguistically equivalent. Hecker v. State, 612 S.W.2d 549 (Tex.Cr.App.1981). We have also held that the word 'deliberate[ly]' as used in Article 37.071 need not be defined in the court's charge to the jury at the penalty stage of a capital murder trial. Russell v. State, 665 S.W.2d 771(Tex.Cr. App.1983); King v. State, 553 S.W.2d 105, 107

Rather, the term 'deliberately' is to be taken and understood in its normal use in common language. Esquivel v. State, 595 S.W.2d 516 (Tex.Cr.App. 1980); King v. State, supra.

"Appellant argues that we cannot be certain that the jury reached its decision without regard to the mitigating circumstances, and this should compel reversal. However, we cannot tell from the record that the jury did not consider the mitigating factors. Article 37.071(a) provides that during the punishment phase evidence may be presented as to any matter that the court deems relevant to sentencing. The jury was allowed to hear evidence of mitigation. The jury was given the freedom to construe 'deliberately' as they understood it to be commonly used. Appellant has provided no evidence to show that the jury did construe 'deliberately' as the equivalent of 'intentionally or knowingly.' We decline to assume they did.

"Because the Texas statutes do not preclude consideration of mitigating circumstances and because appellant has not proven that the jury in the instant case did not consider the mitigating circumstances in answering the first special issue, we overrule his fifth point of error."

[Appendix "A", pages 4-7].

A part of the Petitioner's integrated claim was that this Court's ruling in Enmund v. Florida, 458 U.S. 782 (1982), required, not only a jury charge on mitigating evidence, but also that the jury find whether the defendant on trial was either the triggerman or had attempted to kill the deceased, or intended that a killing take place or intended that lethal force be employed in the course of the crime.

The Court of Criminal Appeals ruled that Enmund did not apply because "[t]he jury heard conflicting evidence as to who was the actual killer, the appellant or his co-defendant, Kelvin Kelley."

The Court further held that Enmund did not require a jury finding that the Petitioner was himself the killer, or that he intended to kill or attempted to kill. The extent of the Enmund rationale merely "requires some proof"that the defendant either killed, attempted to kill, or intended to kill or contemplated a killing before a sentence of death may be imposed.

Since Article 37.07, Section 1(a) requires that the verdict in every criminal action be a general one, and other than the provisions of Article 37.071, "Texas jurisprudence has not authority allowing the submission of special issues to a jury in a criminal trial[,] [t]he trial judge acted properly in denying [Petitioner's] request" to give the following jury instructions:

> ". . . Number two, we object to the Court's charge requiring the jury to determine, if they find the Defendant guilty, whether he is the individual who is directly responsible for the death of the deceased through his own immediate act, or whether they find him guilty as a party, as that term is defined in the Court's charge.
>
> "We want a charge that would require the jury to unanimously determine which of the two he (sic) is responsible, and that that verdict be unanimous. Further, that the verdict sheet at the conclusion of the charge contain options whereby the jury may find him guilty either as a direct actor and perpetrator of the said offense of murder or guilty as a party.
>
> [Appendix "A", pages 10-12].

ARGUMENT AND AUTHORITIES

A plurality of this Court held, in Lockett v. Ohio, 438 U.S. 586 (1978), that, to meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors. See Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977).

There the sentencer was, by statute, precluded from considering as mitigating factors the defendant's lack of specific intent to kill, her relatively minor part in the crime, and the fact that she was not the killer.

Then in Green v. Georgia, 442 U.S. 95, 97 (1979), eight members of the Court agreed that the defendant's proffered evidence that he was not present when the deceased was killed and had not participated in her death were mitigating factors that were "highly relevant to a critical issue in the punishment phase of the trial."

Finally, in Eddings v. Oklahoma, 455 U.S. 104 (1982), a majority of the Court applied the Lockett rule in holding that "Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-114. [original emphasis]. The sentencer "must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. Ibid.

Eddings significantly extended Lockett by requiring that the sentencer weigh all relevant mitigating factors against the aggravating circumstances. Earlier, in Chenault v. Stynchcombe 581 F.2d 444, 448 (5 Cir. 1978), the Court ruled:

> "[Lockett's] constitutional requirement to allow consideration of mitigating circumstances would have no importance . . . if the sentencing jury is unaware of what it may consider in reaching its decision. We read Lockett and Bell then, to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death."

In Spivey v. Zant, 661 F.2d 464, (5 Cir. 1981), cert. denied, 458 U.S. 1111 (1982), 683 F.2d 881 (5th Cir.1982) remanded with instructions, decided before Eddings, the Court held that juries must be "carefully and adequately" guided in their deliberations", saying at page 471:

> "In light of Lockett, Gregg, and Chenault, we hold that the eighth and fourteenth amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also 'guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender' Jurek v. Texas, 428 U.S. at 274. In most cases this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations."

The Spivey Court, relying upon the plurality opinion of the Supreme Court in Jurek v. Texas, 428 U.S. 262 (1976), cited the Texas sentencing procedure as one that "permits the jury to impose the death penalty only after giving specified answers to special interrogatories [that] satisfactorily focus the jury's consideration on the circumstances of the offense and the offender", thus achieving the requisite guidance without explicit discussion of mitigating circumstances. Id. at 471.

This Court was mistaken in this conception of the Texas sentencing procedure. Its reliance upon representations made by the State in Jurek v. State, 522 S.W.2d 934 (Tex.Crim.App. 1975), flawed this Court's initial analysis of the Texas special issues authorized by Article 37.071(b), V.A.C.C.P.

How does special interrogatory number one survive the Spivey test announced by the United States Court of Appeals for the Fifth Circuit?

First, the jury was charged at the punishment phase of the trial: R. I 65.

> "You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you."

Second, the jury was charged at the guilt stage of the trial that "A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense. . . If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, then all of the conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of carrying out the conspiracy." R. I 53.

Third, during the jury voir dire, the court eliminated the application of any mitigating factors to this issue with statements that in answering the first question the conduct of the defendant that caused the death of the deceased included the conduct of the triggerman. The court's instructions were not slanted to the critical issues -- the defendant's conduct that caused the death of the deceased, but instead to the conduct of the triggerman, by applying the law of parties to the first punishment issue. This was done over Petitioner's objection. R. III 1075-1076; 1140-1141.

Fourth, none of the jurors were informed during the voir dire that they could and should consider as mitigating factors evidence that a defendant lacked a specific intent to kill; that he played a relatively minor part in the crime; and that he was not the killer.

Under the Texas procedure, once the jury has determined that an accused has knowingly and intentionally, either as the killer or as a party, caused the death of another in the course of committing one of the aggravating felonies, the answer to question one is "Yes" as a matter of course, unless the aggravating facts are weighed against the mitigating factors, and unless the jury receives clear instructions which not only do not preclude consideration of mitigating factors but which also guide and focus its consideration of the particularized circumstances of the individual offense and the individual offender. Spivey v. Zant, supra at page 471. Further, the Court held in King v. State, 553 S.W.2d 105, 107 (Tex.Crim.App.1977), that the trial court need not provide a special definition of the wo d "deliberately" as used in the first punishment question. Thus, the jury need not distinguish "deliberately" from the words "knowingly" and "intentionally" as used at the first phase of the trial, both of which have already been found to be true before the jury determines whether the defendant's conduct that caused the death of the deceased was committed "deliberately."

The most important mitigating circumstances that a jury could possibly consider in determining question one are that the defendant had no intent to kill and was not the killer. These factors are immaterial under the specific Texas law of criminal responsibility, V.T.C.A. Penal Code, Section 7.02, which is the only instruction given the jury at either phase of the trial that remotely bears upon the jury's consideration of the first punishment issue.

Although Petitioner's lawyers did not request a charge on mitigating evidence at the punishment phase of the trial, this is immaterial under the Court's interpretation of the law. In Quinones v. State, 592 S.W.2d 933(Tex.Crim.App.1980) the defendant, at the punishment phase of the trial, asked that the jury be instructed that "Evidence presented in mitigation of the penalty may be considered should the jury desire, in deter-

mining the answer to any of the special issues." The court refused this request and submitted the special issues prescribed under Article 37.071 V.A.C.C.P. without mention of the mitigating factors. In affirming this Eighth and Fourteenth Amendment violation, the Court said, at page 947:

> "Appellant correctly claims a right to consideration of mitigating circumstances by the jury deciding whether or not to impose the death penalty and he argues that the explanatory charge he requested is necessary to protect that right. We disagree with this conclusion. . . Appellant was entitled to present evidence of any mitigating circumstances and did present such evidence, including a broad discussion of his personal and family background. The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it. . . The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required." [emphasis added]

In Williams v. State, 622 S.W.2d 117 (Tex.Crim.App.1981) the defendant argued that Article 37.071, V.A.C.C.P. was invalid "because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial," and that a "charge on all mitigating evidence at the punishment phase of a capital murder trial is imperative if the jury is to give meaningful consideration to such evidence."

The Court, without regard to its earlier holding in Quinones v. State, supra, summarily rejected this claim, saying at page 120:

> "The appellant has failed to preserve the error now asserted on appeal. No objection to the court's charge or special requested instruction was filed. * * * Absent such an objection or requested instruction, the trial court's failure to charge the jury as to the consideration of mitigating circumstances was not reversible error."

Petitioner, however, did request a specific jury finding that would have effectively determined whether his mitigating evidence was considered and rejected by the jury or whether he was condemned to death under the Texas law of parties.

The Court of Criminal Appeals ruled in Wilder and Armour v. State, 583 S.W.2d 349 (Tex.Crim.App.1979), that "evidence of Armour's 'deliberateness' [was] sufficient solely on the basis of Wilder's conduct, through application of the law of parties." Means v. State, 668 S.W.2d 366 (Tex.Cr.App.1983) (concurring opinion by Judge Clinton). In that case the evidence was undisputed that Armour was the "wheel man" and waited in the car while Wilder committed the robbery and the capital murder.

This Court held, in Green v. Georgia, 442 U.S. 95 (1979), that the exclusion of evidence at the penalty stage of a capital trial, that the defendant was not present when the deceased was killed and had not participated in her murder "was highly relevant to a critical issue in the punishment phase of the trial." See also, Eddings v. Oklahoma, supra.

"[F]undamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determination phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14, 16 (1978). See Gardner v. Florida, 430 U.S. 349 (1977).

Under Texas statutory law, the State had the burden of proving beyond a reasonable doubt that (1) the conduct of the defendant that caused the death of the deceased was committed deliberately and (2) with the reasonable expectation that the death of the deceased or another would result. This question is submitted to a jury that has already found that the defendant "intentionally or knowingly" caused the death of the deceased during the course of the aggravating felony. In Sanne v. State, 609 S.W.2d 762, 775 (Tex.Crim.App.1980), the Court held that "the law of parties applies to [punishment issues one and three] in a capital murder case."

Compare Smith v. State, 540 S.W.2d 693, 697 (Tex.Cr.App.1976), where an affirmative answer to the first punishment issue was upheld in a case involving a non-triggerman on the basis of the evidence presented by the State in support of the future dangerousness issue, the Court apparently reasoning that an accus-

ed who posed a future danger to society, for that reason, acted deliberately in causing the death of the deceased. The Court also noted that there was no evidence that the defendant was under the domination of anyone, nor was he under any mental or emotional pressure.

Milton v. State, 599 S.W.2d 824 (Tex.Crim.App.1980) was based upon the Smith conclusion. There was evidence that the weapon used by Milton in a robbery discharged accidentally while he was struggling with the husband of the deceased. It does not appear that a charge on this mitigating factor was requested, but none was given. Viewing the evidence in the light most favorable to the verdict, the Court of Criminal Appeals substituted its judgment of this critical punishment issue for that of a jury and found the evidence insufficient to show the accidental discharge of the weapon.

These representative cases clearly show that the State's burden of proof on the first punishment issue is materially reduced in all cases involving a non-triggerman, both by the applicable law of criminal responsibility and the prior determination that the defendant's conduct that caused the death of the deceased was committed "intentionally" or "knowingly", creating a compelling analogy with the constitutional principles articulated in Sandstrom v. Montana, 442 U.S. 510 (1979).

There this Court considered the constitutional validity of a State jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" where the defendant, charged with "deliberate homicide" for "purposely or knowingly" causing the death of the deceased, admittedthe killing but denied that he did so "purposely or knowingly." The defendant claimed that this instructionshifted the burden of proof to him on the issue of purpose and knowledge. The State argued that his sole burden under the instruction "was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted "purposely" or "knowingly."

In O'Bryan v. State, 591 S.W.2d 464 (Tex.Cr.App.1979), the Texas court ruled that, though the burden of proof on the special punishment issues was on the State, the option of coming forward with mitigating circumstances was on the defendant. Ignoring the due process ramifications of this holding, the United States Court of Appeals later held that the question of which party should produce evidence of mitigating circumstances in a capital murder trial was a matter of state law and the state court's decision that that the defendant bore such burden entailed no constitutional violation. O'Bryan v. Estelle, 714 F.2d 365 (5th Cir.1983), cert. denied, 104 S.Ct. 1015.

The Sandstrom Court's analysis began with this question: "[W]hether a defendant has been accorded his constitutional rights [in a jury instruction] depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. at 514.

Thus where the jurors were told that the law presumes that a person intends the ordinary consequences of his voluntary acts, "[t]hey were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory." Id. at 515.

It is equally true that a reasonable Texas juror, following the law of criminal responsibility, and having already determined that the defendant acted knowingly and intentionally, could easily have viewed the first punishment question as requiring a "Yes" answer.

The second prong of the State's argument in Sandstrom was that "by holding that [d]efendant's sole burden under instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted 'purposely' or 'knowingly'. . . the Montana Supreme Court decisively established that the presumption at most affected only the burden of going forward with evidence of intent -- this is, the burden of production." Id. at 516. The Court rejected this claim, saying at page 517:

> "[The jurors] were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all. Given the common definition of 'presume'. . . and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways. First, a reasonable jury could well have interpreted the presumption as 'conclusive,' that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent."

In Berkovitz v. United States, 213 F.2d 468, 474 (5 Cir. 1954), a tax evasion case, the trial court excluded the defendant's evidence that he had paid the taxes due after the criminal charges were filed and then instructed the jury that it could consider whether the defendant had discharged his tax liability in determining his criminal intent. The Court reversed the conviction, saying at pages 474-475:

> "[The Supreme Court said, in Morissette v. United States, 342 U.S. 246, 274-275, that] "intent must be based' upon 'all the evidence considered together', and . . . to say to the jury in the present case that it might find guilt as a matter of law from a presumption flowing from the fraudulent making of the return without at the same time telling it that the evidence offered by the accused to show good faith had to be taken into consideration in reaching such result, 'would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.'" [emphasis added]

While there is no presumption of innocence at the punishment phase of a capital trial, other fundamental principles under the Eighth and Fourteenth Amendments are involved.

This Court has held that the sentencing process as well as the trial of a capital case itself, must satisfy the requirements of the Due Process Clause and that the sentencing is a critical stage of the criminal proceedings. See Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion); Presnell v. Georgia, 439 U.S. 14 (1978) (majority opinion).

In Lockett v. Ohio, 438 U.S. 586, 605 (1978), a plurality of the Court held:

> "[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

This proposition was accepted by a majority of the Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), and the Lockett rule was expanded to require that the sentencer must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances.

Even if Gardner, Lockett, Presnell, Green and Eddings, be construed as no more than procedural due process cases designed to protect an established substantive value, they give rise to two critical issues.

First, is there a substantive violation in permitting a jury to impose the death sentence without considering all relevant mitigating factors presented by the defendant and weighing them against the aggravating factors presented by the State.

Second, if there is such a substantive violation, does Article 37.071, V.A.C.C.P. afford adequate procedural respect to the substantive value that the cited cases sought to protect by merely permitting the defendant to present all relevant mitigating factors at the punishment phase of the trial, without insuring that the jury, under appropriate instruction from the trial court, consider and weigh these mitigating factors in answering the punishment questions?

The first of these two issues was settled by this Court in the cited cases. There is such a substantive violation. It is impermissible for the State to either exclude such evidence or to prevent its consideration by the sentencer.

The Texas sentencing procedure utilized to insure these substantive values is constitutionally invalid, for reasons not readily apparent to this Court in Jurek v. Texas, supra, in cases where there is evidence in mitigation that the defendant was not the killer, had no specific intent to kill, and played a relatively minor part in the commission of the offense.

The Court of Criminal Appeals has narrowed the "deliberate" conduct and "reasonable expectation" requirements of question one, thereby narrowing the elements that the State must prove beyond a reasonable doubt, as required by State law, in order to obtain a constitutionally valid death sentence.

First, the prosecution is permitted to exclude all jurors who are hesitant in imposing a death sentence upon a defendant who has not himself actually committed the murder.

Second, the trial court is not required to define the meaning of deliberate conduct or to distinguish it from "knowingly" or "intentionally", as used in the charge at the guilt phase of the trial.

Third, the trial court is not required to distinguish "reasonable expectation" from "anticipation" as used in the charge at the guilt phase of the trial.

Fourth, the jury is free to interpret "deliberate" as "knowing" or "intentional." This is reflected and supported by the record of the voir dire in Petitioner's case.

Fifth, the voir dire, coupled with the court's instruction on the law of parties and criminal responsibility at the guilt phase of the trial, equates "anticipate" with "reasonable expectation".

The jury may thus, in answering the first punishment question in a case invovling a non-triggerman, conclude that since the defendant intentionally participated in the planned felony, he anticipated or should have anticipated that the death of the deceased or another would occur, and that the

first question should be answered "Yes."

This relieves the State of proving beyond a reasonable doubt that the first question should be answered "Yes" in all cases where the defendant was not the killer, had no specific intent to kill, and whose role in the offense was relatively minor. Alternatively, it substantially reduces the State's burden of proof on that issue.

It can hardly be argued that the trial court court may instruct the jury that the defendant has the burden of distinguishing "deliberate" from "knowingly" or "intentionally", and "reasonable expectation" from "anticipated or should have anticipated", yet that is the effect of the Texas procedure. See and compare Holloway v. McElroy, 632 F.2d 605 (5 Cir. 1980, rehearing and rehearing en banc denied, 1981); Krzeminski v. Perini, 614 F.2d 121 (6 Cir. 1980); and United States v. Schilleci, 545 F.2d 510 (5 Cir. 1977).

The mere fact that a defendant may present mitigating evidence, and that his counsel may argue the mitigating factors to the jury, are constitutionally insufficient. "It was the duty of the court to safeguard [Petitioner's] rights, a duty only it could have performed reliably." Taylor v. Kentucky, 436 U.S. 478, 489 (1978); United States v. Nelson, 498 F.2d 1247 (5 Cir. 1974); Estelle v. Williams, 425 U.S. 501, 503 (1976). The courts must be alert to factors that may undermine the fairness of the sentencing process in a capital case, and must carefully guard against dilution of the principle that the "sentencing authority [be] given adequate information and guidance." Gregg v. Georgia, 428 U.S. 153,195 (1976). [emphasis added]. As noted by Justice O'Connor, concurring in Eddings v. Oklahoma, supra:

> "Because sentences of death are 'qualitatively different' from prison sentences, Woodson v. North Carolina, 428 U.S. 280, 306 (1976) (opinion of Stewart, J.) this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." 30 CrL at 3051.

The impact of a particular practice on the judgment of jurors cannot always be fully determined but the probability of detrimental effects on fundamental rights, particularly in a capital case, should not be given niggardly application. Cf., Estes v. Texas, 381 U.S. 532 (1965); In re Murchison, 349 U.S. 133 (1955).

A reasonable jury in Petitioner's case could have interpreted the first punishment issue as requiring a "Yes" answer because it had already found that the death of the deceased was caused "knowingly" or "intentionally," by either Kelley or Petitioner, and that Petitioner should have anticipated that such result would occur. This evidence, inherent in the jury's finding of guilt, was much stronger than the presumption denounced by the Court in Sandstrom v. Montana, supra. It could have been overcome only by evidence from Petitioner, and absent that, an affirmative answer to the punishment issue followed as a matter of course, without regard to the real punishment issue of whether the conduct that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death would occur, considered in light of mitigating evidence that Petitioner did not kill the deceased, had no intent to do so, and played a relatively minor role in the crime. Thus, the burden of proving that he did not act deliberately and that he had no reasonable expectation that the death of the deceased would occur, was cast upon Petitioner. Even if Petitioner be mistaken in this assertion, the jury was given no standards by which to gauge the mitigating factors. But even if the jury may not have reached its affirmative answer as a logical extension of the guilt determination, "we cannot be certain that this is what they did do . . . and we have no way of knowing that [Petitioner] was not [sentenced to death]" without regard to the highly relevant mitigating circumstances that should have been considered by the jury, and that should have been weighed against the aggravating factors in evidence. Sandstrom v. Montana, 442 U.S. 510 (1979).

This fundamental error surfaced during Stewart's argument at the punishment phase, when his attorney said:

> ". . . It is the Court's charge, and no place in here, nowhere, do you find the law of parties. It isn't in this charge. It is not part of your consideration. It may have been the law in the prior hearing, but it's not the law now."
>
> "MR. ARNOLD: I object to that."
>
> "THE COURT: It is sustained."
>
> "MR. ARNOLD: That is a misstatement of the law."

From the outset and at every critical stage of the trial, the court's application of the Texas punishment statutes invidiously tilted the scales in favor of death and against life. Both the Eighth and the Fourteenth Amendments to the Constitution of the United States were violated by these procedural and substantive errors.

The State conceded below that the jury heard evidence relating to two theories. First, it was the State's theory that Petitioner was the killer. Second, the State's own evidence raised the theory that it was Kelly who killed the deceased while Petitioner merely served as a look-out. See Petitioner's confession R. VI, 2606.

A. THE COURT'S CHARGE

The Court instructed the jury that "All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both. A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

"If, in the attempt to carry out a conspiracy to commit one felony another felony is committed by one of the conspirators, then all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of carrying out of the conspiracy. . ." [emphasis added]. In applying the law to the facts the Court gave the following instruction: "Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of February, 1980. . . the Defendant, Darryl Elroy Stewart, did while in the course of committing or attempting to commit burglary of a habitation. . . intentionally caused the death of Donna Kate Thomas by shooting her with a gun, then you will find the Defendant guilty of capital murder, as charged in the indictment. Or if you find from the evidence beyond a reasonable doubt that on or about the 6th day of February, 1980. . . that Kelvin Kelly and Darryl Elroy Stewart entered into a conspiracy to burglarize [a] habitation . . . and that pursuant thereto they did carry out or attempt to carry out such conspiracy to commit ry out such conspiracy to commit burglary, and while in the course of committing such burglary, if any, Kelvin Kelly did intentionally cause the death of Donna Kate Thomas by shooting her with a gun and that the Defendant, Darryl Elroy Stewart, pursuant to such conspiracy, if any, with the intent to promote, assist, or aid Kelvin Kelly in the commission or attempted commission of the said burglary, then and there, at the time of the shooting, if any, was acting with and aiding Kelvin Kelly in the execution or attempted execution of said burglary, and that the shooting of Donna Kate Thomas followed in the execution of the conspiracy and in furtherance of the unlawful purpose of Kelvin Kelly and Darryl Elroy Stewart to commit the burglary, and that the shooting of Donna Kate Thomas was an offense that should have been anticipated as a result of the

carrying out of the conspiracy, then you will find the Defendant, Darryl Elroy Stewart, guilty of capital murder as charged in the indictment."

B. REVIEW OF THE APPLICABLE TEXAS LAW

In Smith v. State, 540 S.W.2d 693, (Tex.Crim.App.1976), the Court affirmed the capital murder conviction of a defendant whose companion was the trigger man in a robbery, saying at page 696: "[A]ppellant complains that the evidence is insufficient to support the conviction, since it was the appellant's co-defendant who killed the deceased during the robbery. Such a contention completely ignores the law of principals, and is without merit." The Court relied upon Thompson v. State, 514 S.W.2d 275, 276 (Tex.Crim.App.1974).

The Court's reasoning in Thompson was: "Where several people are acting together in pursuit of an unlawful act, each one is liable for collateral crimes, even though unplanned and unintended, committed by other principals if those crimes are the foreseeable, ordinary and probable consequences of the preparation or execution of the unlawful acts."

Thereafter the Legislature enacted V.T.C.A. Penal Code, Section 7.01, which reads as follows:

"(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

"(b) Each party to an offense may be charged with the commission of the offense.

"(c) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice."

V.T.C.A. Penal Code, Section 7.02, enacted at the same time, provides the following:

"(a) A person is criminally responsible for an offense committed by the conduct of another if:

"(1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;

"(2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or

"(3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent the commission of the offense.

"(b). If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy."

In Livingston v. State, 542 S.W.2d 655, (Tex.Crim.App. 1976), another capital murder conviction involving a non-triggerman, the Court cited Smith for the proposition that "a defendant could be convicted of murder despite the fact it was the co-defendant who killed the deceased during the course of the robbery in light of the law of principals then in effect" and added: "We do not construe the foregoing Sections 7.01 and 7.02 of the new Penal Code to call for a different result."

Ruiz v. State, 579 S.W.2d 206, (Tex.Crim.App.1979), passed the outer limits of the Eight Amendment, as will be seen later in the discussion of Enmund. There the capital murder was committed in the course of a robbery. The evidence indicated that the appellant was the person who did the shooting, but the evidence was circumstantial and suggested that the fatal shooting could have been done by either of the appellant's two co-conspirators. The Court had this to say:

"The essential elements of the offense * * * and the theory on which the prosecution proceeded are (1) the appellant conspired with others to commit an aggravated robbery and (2) one of the co-conspirators (3) intentionally or knowingly (4) caused the death of an individual (5) in the course of committing or attempting to commit the aggravated robbery (6) in furtherance of the unlawful purpose of the conspiracy and (7) which should have been anticipated as a result of carrying out the conspiracy."

The Court held that: "V.T.C.A. Penal Code, Section 7.02(b), eliminates any necessity on the part of the State to prove the appellant had any intent to kill Picinich. The evidence adduced from [the] witnesses would permit any jury to infer that the aggravated robbery was committed as a result of a conspiracy and that a murder should have been anticipated in the carrying out of the conspiracy to commit aggravated robbery." [emphasis added].

In Wilder and Armour v. State, 583 S.W.2d 349(Tex.Cr. App.1979) the Court rejected the Eighth Amendment claim that the imposition of a death sentence constituted cruel and unusual punishment as applied to the "wheel man" in a robbery-murder who did nothing to deliberately cause the death of the deceased, citing Sections 7.01 and 7.02, and its prior holding in Livingston v. State, supra.

In Enmund v. Florida, supra, the Court concluded that the Eighth Amendment prohibits the death penalty for an individual who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 798.

The Court spelled out its holding. "For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or

causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. * * * Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty * * *." Ibid, at 801.

Justice O'Connor, dissenting, said, 458 U.S. at 824: "The Court's holding today is especially disturbing because it makes intent a matter of federal constitutional law, requiring this Court both to review highly subjective definitional problems customarily left to state criminal law and to develop an Eighth Amendment meaning of intent."

And, at page 825, she wrote: "Thus, while proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness, the Court fails to explain why the Eighth Amendment concept of proportionality requires rejection of standards of blameworthiness based on other levels of intent, such as, for example, the intent to commit an armed robbery coupled with the knowledge that armed robberies involve substantial risk of death or serious injury to other persons. Moreover, the intent-to-kill requirement is crudely crafted; it fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of the crime."

The Court of Criminal Appeals has squarely held, in Ruiz v. State, 579 S.W.2d 206, (Tex.Cr.App.1979), that "V.T.C.A. Penal Code, Section 7.02(b), eliminates any necessity on the part of the State to prove the appellant had any intent to kill [the victim]."

The State's entire voir dire on the issue of accessorial liability emphasized that under the Texas law the State was not required to prove that a non-trigerman had an intent to kill or to cause a killing.

The State's appellate argument was slanted toward the conclusion that Petitioner was, in fact, the killer. That is not the issue. Under Enmund, the State is required to obtain a jury finding that the defendant was himself the killer, or that he intended to kill, or attempted to kill. Petitioner requested that this specific issue be submitted to the jury. His request was denied, and the jury was allowed to convict him of capital murder in violation of the Enmund mandate.

Petitioner's requested charge eliminates any issue as to the retroactive application of Enmund to his case, even assuming that such a question is generally valid. The State made no such challenge.

Every juror stated unequivocally on voir dire that he or she could find the lookout and non-triggerman guilty of capital murder and could sentence him to death, even though he had no specific intent to kill or cause the killing and even if he did not want anyone to be killed.

The prosecutor's objection, detailed above, that it was a misstatement of the law for defense counsel to inform the jury that the law of parties did not apply at the penalty phase of the trial, eliminated any need for the State to prove the "deliberateness"issue, it being immaterial whether Petitioner or Kelley killed the deceased.

Judge Clinton, with Judges Teague and Miller concurring, clearly articulated the overriding issue in this case and is incorporated herein by reference. See Appendix "A", pages 1 through 5 of the dissenting opinion.

CONCLUSION AND PRAYER

As Judge Clinton said in his dissent, "If we are to ensure the constitutionality of 37.071, we must not only give lip service to broadly interpreting it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to pro-

duce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings in Lockett and Eddings until the defendant affirmatively proves the contrary!" Appendix "A", dissenting opinion, page 4.

Because of the Eighth and Fourteenth Amendment violations detailed above, the Court should grant this Petition for Writ of Certiorari and after hearing thereon, set aside the penalty of death assessed against the Petitioner, Darryl Elroy Stewart. Petitioner prays for such relief.

Respectfully submitted

Will Gray

Will Gray
Petitioner's lawyer
2038 Lexington Street
Houston, Texas 77098
713-759-0585

CERTIFICATION

I certify that I mailed a copy of this Petition by certified mail, postage prepaid, to the Honorable Jim Mattox, Attorney General of Texas, Attention: Enforcement Division, Supreme Court Building, Austin, Texas 78711, on April 8, 1985.

Will Gray

Will Gray

DARRYL ELROY STEWART, Appellant

NO. 68,889, v. --- Appeal from Harris County

THE STATE OF TEXAS, Appellee

OPINION

Appellant was convicted of capital murder. Punishment was assessed at death. The sufficiency of the evidence is not challenged.

In grounds of error one through three, appellant complains of the exclusion of twelve prospective jurors for cause in violation of Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).[1/] In his fourth ground of error, he contends that error was committed when the trial court denied his challenge for cause to prospective juror Felts and he was forced to use a peremptory challenge.

1/ The state of the record in this case causes us to offer a comment concerning its organization. The record has come to us in eleven volumes. The transcription of the proceedings has not been arranged in chronological order and this makes it extremely difficult to review, further complicated by the fact that there is no central index. To illustrate, the voir dire begins in Volume VII, page 2617. It continues through Volume XI, page 4204. It then continues in Volume I, page 231 and ends in Volume IV, page 1753. The actual trial on guilt and punishment is located in Volumes V and VI. If a record is not organized chronologically, the court reporter should at least furnish the appellate courts with a complete central index. We compliment both the attorney for appellant and the State for citing us to the proper portions of the record for without their assistance our task would have been even more difficult.

APPENDIX "A"

Voir dire selection in this case commenced on June 12, 1980, some thirteen days prior to the United States Supreme Court's decision in Adams v. Texas, supra. At the time of the Adams decision, the voir dire selection in this case was still in progress. Prior to the Adams decision, all of the jurors complained of in appellant's first four grounds of error were excused by the trial court. On July 2, 1980, appellant's trial counsel, aware of the Adams decision, apprised the trial court that some of the jurors who had been previously excused might have been excused erroneously and requested one additional peremptory strike to cure the error:

"MR. MUSSLEWHITE: If it please the Court, comes now the Defendant Darryl Stewart by and through his attorneys, respectfully request the Court for additional pre-emptory (sic) challenges. The next to the last juror, that was stricken by the Defendant, whose name is Earl Felts, it is our position that we have a right to rely on the jurors to follow the law and may be able to fit into our defensive theory. He was challenged in a situation where if the State challenged him, it is my humble opinion it would have been a good challenge, but because the defense challenged him on this ground, it was overruled and we were required to strike him. Further, with regards to some, as I have it, it may not be quite correct, but some nineteen challenges were made by the State for cause concerning perspective (sic) jurors.

"In view of the recent Supreme Court opinion, I believe it is Adams vs. Texas, to the best of my recollection there were two jurors back in there, and I apologize to the Court, I cannot give their names -- I can start going back in here. But up through the first sixteen perspective (sic) jurors who were excused for cause, it is my recollection that at least two of them were put to answer the question based upon the Texas Code dealing with whether or not the fact that the death penalty was involved in this case, whether or not that would affect their

deliberations on any fact issue, and with an affirmative answer, they were excused, which we submit, for the recent case, is improper.

"Further, with regard to some of these jurors, we feel that they were improperly excused, based upon the law of parties in some instances -- I honestly can't tell you how many. It is our belief that the Court improperly discussed the law of parties with reference to the answer to the first question in the punishment phase. Further, with reference to other jurors, perspective (sic) jurors, there were some who were excused because they could not answer the questions dealing in the punishment phase with respect to a party who was not the actual direct perpetrator of the offense.

"We further object to the systematic exclusion of all blacks from this jury. There were some, as I recall, that were struck by the -- I will take that back. The State has used a couple of strikes on them. I don't recall. But five of those that were struck for cause were black.

"For all of those reasons, Your Honor, we would respectfully request an additional pre-emptory (sic) challenge.

"THE COURT: Right. I think the record should reflect that the Adams vs. Texas case has been decided after we had already selected some jurors in this case. And without assigning it to any particular juror, I am going to grant your motion for that additional strike, in abundance of caution, in the matter.

"MR. MUSSLEWHITE: Thank you.

"MR. ARNOLD: Is that one additional strike, Your Honor?

"THE COURT: One additional strike." (Emphasis added)

A constitutional error may be waived by the party affected. Rogers v. State, 640 S.W.2d 265 (Tex.Cr.App. 1982)(on State's Second Motion for Rehearing); Thompson v. State, 537 S.W.2d 732

(Tex.Cr.App. 1976). This applies to jurors improperly removed in capital murder cases. Crawford v. State, 617 S.W.2d 925 (Tex.Cr.App. 1981)(on rehearing). Russell v. State, 598 S.W.2d 238 (Tex.Cr.App. 1980); Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976).

It is clear in the instant case with reference to those jurors who might have been improperly excused prior to July 2, 1980, and with reference to the denial of appellant's challenge for cause to prospective juror Felts which also occurred prior to July 2, 1980, that appellant received all the relief which he requested. Since appellant received the one additional peremptory strike which he requested and made no further objection concerning the court's action pertaining to these thirteen jurors, we hold that error, if any, was waived. DeRusse v. State, 579 S.W.2d 224 (Tex.Cr.App. 1979); Duffy v. State, 567 S.W.2d 197, 205 (Tex.Cr.App. 1978); Boulware v. State, supra. Grounds of error one through four are overruled.

In his fifth ground of error, appellant contends that Article 37.071, V.A.C.C.P., violates the Eighth and Fourteenth Amendments of the United States Constitution because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial. Appellant relies upon the United States Supreme Court decisions in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). All three of the cases relied upon by appellant concern situations in which the sentencers in a capital case were precluded from considering mitigating evidence in the punishment phase of each case. To meet constitutional muster, the sentencers in a capital case must be allowed to consider all relevant mitigating evidence. Lockett v. Ohio, supra; Green v. Georgia, supra;

Eddings v. Oklahoma, supra; Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Article 37.071, supra, has previously passed constitutional muster in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and Quinones v. State, 592 S.W.2d 933, 947 (Tex.Cr.App. 1980), where it was determined that Article 37.071 provides that "in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." Thus, "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a death sentence." Jurek v. Texas, 96 S.Ct. at 2957.

Appellant relies upon Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), for the proposition that the jury in a capital case must be instructed in the court's charge to consider mitigating circumstances in passing upon the question of the death penalty. Spivey v. Zant, at page 471. We would remind appellant that this Court is not bound by the decisions of any lower federal court. Flores v. State, 487 S.W.2d 122 (Tex.Cr.App. 1972); Pruitt v. State, 463 S.W.2d 191 (Tex.Cr.App. 1971). Further, we held in Quinones v. State, supra, that no jury charge regarding evidence of any mitigating circumstances was necessary since the questions prescribed under Article 37.071 clearly allow the jury to grasp the logical relevance of mitigating evidence. Finally, our review of the record shows that appellant never requested the trial court to charge the jury on mitigation.

Appellant argues that, since by the time the punishment phase of the trial was reached the jury had already found that the defendant acted "intentionally or knowingly," the jury was precluded from considering mitigating circumstances when it considered appellant's "deliberateness" in answering Special

Issue No. 1. Further, he argues that in a case such as the instant one, where there was evidence that the defendant was not the triggerman, but the jury was instructed on the law of parties at the guilt-innocence phase, the State's burden of proof on the first punishment issue was materially reduced, and the jury was compelled to view the first punishment question as requiring a "yes" answer.

We would note initially that there was conflicting evidence as to whether appellant was the triggerman. Thus, it is very possible that the jury convicted appellant believing that he did kill the victim. Furthermore, we have held that "deliberately" and "intentionally or knowingly" are not linquistically equivalent. Heckert v. State, 612 S.W.2d 549 (Tex.Cr.App. 1981). We have also held that the word "deliberate[ly]" as used in Article 37.071 need not be defined in the court's charge to the jury at the penalty stage of a capital murder trial. Russell v. State, 665 S.W.2d 771 (Tex.Cr.App. 1983); King v. State, 553 S.W.2d 105, 107 (Tex.Cr.App. 1977). Rather, the term "deliberately" is to be taken and understood in its normal use in common language. Esquivel v. State, 595 S.W.2d 516 (Tex.Cr.App. 1980); King v. State, supra.

Appellant argues that we cannot be certain that the jury reached its decision without regard to the mitigating circumstances, and this should compel reversal. However, we cannot tell from the record that the jury did not consider the mitigating factors. Article 37.071(a) provides that during the punishment phase evidence may be presented as to any matter that the court deems relevant to sentencing. The jury was allowed to hear evidence of mitigation. The jury was given the freedom to construe "deliberately" as they understood it to be commonly used. Appellant has provided no evidence to show that the jury did construe "deliberately" as the equivalent of "intentionally or knowingly." We decline to assume they did so.

Because the Texas statutes do not preclude consideration of mitigating circumstances and because appellant has not proven that the jury in the instant case did not consider the mitigating circumstances in answering the first special issue, we overrule his fifth ground of error.

In his sixth ground of error, appellant complains of the exclusion of testimony that would have shown that appellant's co-defendant was the actual killer.

On direct examination, Detective William Owen testified that he and his partner Detective Jim Roberts investigated the crime scene. On cross-examination, Detective Owen testified that during the course of their investigation he personally did not question Michael Rainey, a neighborhood child, but that the child was questioned by Detective Roberts. Appellant now argues that Detective Owen should have been allowed to testify regarding information Detective Roberts obtained from Michael Rainery because that information would have shown that appellant's co-defendant was the actual killer. Defense counsel asked the following:

> "Q. Do you know whether or not you got information about it, the description being a heavy-chested man?
>
> "MR. ARNOLD: I object to this. This is the very thing I object to as being hearsay.
>
> "THE COURT: Sustained.
>
> * * *
>
> "THE COURT: Whatever information appears on that offense report that you got from someone else, was it from another officer or was it from a witness or what?
>
> "THE WITNESS: Yes, I think the information he specifically is speaking of came from another officer.
>
> "THE COURT: Another officer?
>
> "THE WITNESS: Yes, sir.
>
> "THE COURT: Your objection is sustained."

In order for a complaint concerning the exclusion of evidence to be considered by an appellate court, the record must show what the excluded testimony would have been. Absent a showing of what such testimony would have been, or an offer of a statement concerning what the excluded evidence would show, nothing is presented for review. Rumbaugh v. State, 629 S.W.2d 747 (Tex.Cr.App. 1982); James v. State, 546 S.W.2d 306 (Tex.Cr.App. 1977). The record before us contains no evidence of what the excluded testimony would have been, much less what it would have shown. We are unable to review the merits of appellant's ground of error. Furthermore, other evidence was adduced at trial, specifically appellant's own confession, which if believed would have shown that the co-defendant was the actual killer. This ground of error is overruled.

Appellant has filed a supplemental brief in which he alleges four additional grounds of error. In his first additional ground of error, appellant argues that his conviction and sentence of death are invalid under Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In Enmund, the United States Supreme Court reversed the defendant's conviction because it was never proven that Enmund killed the deceased, attempted to kill the deceased, intended that a killing take place or intend that lethal force be employed in the course of the crime. The Supreme Court wrote that in a case such as Enmund, where the defendant was clearly not the triggerman, the focus must be on the defendant's culpability, not on the culpability of those who did the actual killing and robbery:

> ". . . for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1970)(footnote omitted), which means that we must focus on 'relevant facts of the character and record of the individual offender.' Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)."

We are not faced with the Enmund situation in the instant case, however. The jury heard conflicting evidence as to who was the actual killer, the appellant or his co-defendant, Kelvin Kelly.

Viewing the evidence in the light most favorable to the verdict, the evidence shows that appellant and Kelly, who both lived in the same apartment complex as the victim, were walking through the complex when they passed the open door of the victim's apartment. Appellant told Kelly that he wanted his (appellant's) gun, a .25 automatic, because there might be something in the victim's apartment he could steal. Appellant retrieved his gun and entered the victim's apartment. Kelly meanwhile was standing outside of the victim's apartment. Kelly heard the victim scream, "Oh, my God" and he rushed into the apartment to see what was happening. Kelly, standing in the living room, could hear appellant talking to the victim in one of the bedrooms. Appellant ordered the victim to undress. After she had complied, he ordered her to get into a closet. Kelly testified that at this point he tried to get the appellant to leave but appellant pointed the gun at Kelly and told him to look around the apartment for valuables. While Kelly was looking around, he heard the front door of the apartment slam. The victim's three-year-old daughter had entered the apartment. Appellant put the little girl in the closet with her mother. Soon appellant made the victim come out of the closet and sit on the bed. When appellant demanded that the victim engage in sexual intercourse with him, she told him she could not since she was having her period. When he suggested that she engage in fellatio with him, she refused and began crying. Appellant became upset. He put his pistol to her head, covered it with a pillow and shot her twice, killing her.

The victim's daughter testified that she only saw one person in the apartment at the time of her mother's murder. Her

description of the killer matched appellant. Because there is evidence which shows appellant was the triggerman, we hold that Enmund v. Florida does not apply to the instant case. This ground of error is overruled.

In his remaining grounds of error, appellant complains that the jury charge at the guilt-innocence phase of the trial was faulty because it allowed the jury to convict appellant without making a finding that appellant was the actual killer or merely a party to the offense.

The court charged the jury on the law of parties pursuant to V.T.C.A., Penal Code, Section 7.01(a), Section 7.02 and Section 15.02(a) and (b). The application paragraph of the charge reads as follows:

> "Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th of February, 1980, in Harris County, Texas, the Defendant, Darryl Elroy Stewart, did while in the course of committing or attempting to commit burglary of a habitation, owned by William E. Melton, intentionally caused the death of Donna Kate Thomas by shooting her with a gun, then you will find the Defendant guilty of Capital Murder, as charged in the Indictment. Or if you find from the evidence beyond a reasonable doubt that on or about the 6th day of February, 1980, in Harris County, Texas, that Kelvin Kelly and Darryl Elroy Stewart entered into a conspiracy to burglarize the habitation of William E. Melton, and that pursuant thereto they did carry out or attempt to carry out such conspiracy to commit burglary, and while in the course of committing such burglary, if any, Kelvin Kelly did intentionally cause the death of Donna Kate Thomas by shooting her with a gun and that the Defendant, Darryl Elroy Stewart, pursuant to said conspiracy, if any, with the intent to promote, assist, or aid Kelvin Kelly in the commission or attempted commission of the said burglary, then and there, at the time of the shooting, if any, was acting with and aiding Kelvin Kelly in the execution or attempted execution of said burglary, and that the shooting of Donna Kate Thomas followed in the execution of the conspiracy and in furtherance of the unlawful purpose of Kelvin Kelly and Darryl Elroy Stewart to commit the burglary, and that the shooting of Donna Kate Thomas was an offense that should have been anticipated as a result of the carrying out of the conspiracy, then

> you will find the Defendant, Darryl Elroy Stewart, guilty of Capital Murder as charged in the indictment.
>
> "If you do not believe or if you have a reasonable thereof, (sic) then you will find the Defendant not guilty."

The appellant made the following objections to the charge:

> ". . . Number two, we object to the Court's charge as given to the jury for not requiring the jury to determine, if they find the Defendant guilty, whether he is guilty as a direct actor, that is, the individual who is directly responsible for the death of the deceased through his own immediate act, or whether they find him guilty as a party, as that term is defined in the Court's charge.
>
> "We want a charge that would require the jury to unanimously determine which of the two he is responsible, under which theory he would be responsible, and that that verdict be unanimous. Further, that the verdict sheet at the conclusion of the charge contains options whereby the jury may find him guilty either as a direct actor and perpetrator of the said offense of murder or guilty as a party."

This was overruled.

Appellant now argues that under Enmund the State is required to obtain a jury finding that the defendant was himself the killer, or that he intended to kill or attempted to kill. However, Enmund does not require such a finding. Rather, Enmund requires some proof that the defendant either killed, attempted to kill, intended to kill or contemplated a killing before a sentence of death may be imposed.

Furthermore, Article 37.07, Section 1(a) provides that "[T]he verdict in every criminal action must be general." Other than the provisions in Article 37.071, V.A.C.C.P., Texas jurisprudence has no authority allowing the submission of special issues to a jury in a criminal case. The trial judge acted properly in denying appellant's request.

Furthermore, Texas law does provide that an individual may be found guilty of an offense if he was a party to the offense. Sections 7.01, 7.02, supra. And under Enmund, an individual may

be found guilty of capital murder and sentenced to death even if he was not the triggerman but contemplated the use of lethal force in the commission of the offense.

Since Enmund does not require the type of jury finding which appellant requested, we find the trial court properly overruled appellant's ob_ ction to the charge at the guilt-innocence phase of the trial. These grounds of error are overruled.

The judgment is affirmed.

McCormick, Judge

(Delivered September 19, 1984)
En Banc

DARRYL ELROY STEWART, Appellant

NO. 68,889 v. - - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

Given the facial narrowness of Article 37.071(b)(2), V.A.C.C.P.[1/] it is certainly not specious to argue, as did appellant, that we cannot be certain that the jury reached its decision with due consideration to whatever mitigating circumstances appellant could proffer. Yet, Judge McCormick's reply seems intentionally unresponsive: the appellant did not prove that the jury did not properly consider mitigating circumstances.[2/] In truth, no party has a "burden of proof" in this matter. The State of Texas, however, does have duties to ensure an accused those processes which are due under the law generally, and that the jury is given adequate guidance in its deliberations specifically.

Since 37.071(b)(2) was tentatively approved in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), this Court has brooked no argument that (b)(2) may, standing alone, be an inadequate guide when it comes to consideration of mitigating circumstances. Rather, as Judge McCormick sees it, the question of guidance was "sett ed" in Quinones v. State, 592 S.W.2d 933, 947 (Tex.Cr.App. 1980), wherein Judge Dally opined:

> "The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a

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1/ "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." [Hereinafter 37.071(b).]

2/ Appellant also argues the term "deliberately," as employed in V.T.C.A. Penal Code, Article 37.071(b)(1), should be defined. I stand by my dissenting opinion in Russell v. State, 655 S.W.2d 771 (Tex.Cr.App. 1983).

probability of future criminal acts of violence."

No doubt this is true; its significance, however, is unclear. For, in answering (b)(2), a jury would decidedly consider the range and severity of the defendant's prior criminal conduct; yet truly "mitigating" evidence[3/] - such as a mental disease or defect, a deprived, abusive childhood or the youth of the defendant - while militating against a death sentence in general, surely has tremendous specific probative weight in favor of answering the future dangerousness question "yes." Thus, any mitigating force such evidence might have in the minds of jurors in a particular case is emasculated by the narrow language of (b)(2), when unaided by an instruction as to the permissible use of that "mitigating" evidence.

A brief look at Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) will illuminate the point. There, the Supreme Court held that the sentencer is required to consider the following evidence which the court itself characterized as "mitigating:" that the 16 year old Eddings was a

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3/ "Mitigate" means "to cause to become less harsh or hostile: mollify. . . to make less severe or painful: alleviate." Webster's Seventh New Collegiate Dictionary (1969).

In the context of deciding the penalty in a capital case in Texas, the effect of "mitigating" evidence is presumably a basis for bestowing mercy on the defendant.

If not, and there is no room for mercy, perhaps the Supreme Court will have to acknowledge what it denied in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976): the Texas scheme sets up a mandatory death sentence much like those condemned as unconstitutional in Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and Roberts v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977).

child of divorce and had lived without rules or supervision since he was five; that his mother was an alcoholic and a prostitute; that at the age of 14 he was sent to live with his father who attempted to control the disturbed adolescent with excessive physical punishment; that Eddings was emotionally scarred; and that his mental development was at a level several years below his age.

Depending on one's perspective and focus, such evidence is at once damning and mitigating. It is this very paradox that renders asking the jury questions only in the language of 37.071(b) constitutionally insufficient. The truth is that many vicious criminals suffered at the hands of irresponsible and unfit parents; common knowledge holds that many violent criminals were physically abused children and that the American crime rate rises and falls in direct proportion to the number of our citizens who happen to be under 35. When we prosecute such a person and place in a jury's hands the decision of whether that person is to live or die, is it enough to protest that we have allowed him to adduce mitigating evidence, yet take no measure to ensure the jury's understanding of their role in regard to that evidence? I think not. At risk of redundancy, a history of deprivation and misfortune may, in some cases, moderate blameworthiness, even while the same history may establish the probability of a defendant committing future acts of violence. Or, similarly, the very mental or emotional disturbance which impairs a defendant's ability to conform to the law might lead the jury to exercise mercy.

In sum, a defendant is entitled to jurors whose consideration of mitigating circumstances is not limited to whether that

evidence does or does not indicate future dangerousness. The jury must not be precluded in law or in practice from according independent weight to factors that are mitigating but perhaps irrelevant to the probability issue of future dangerous conduct. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and, Eddings, supra; cf. Woodson v. North Carolina, 428 U.S. 286, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Rather than acknowledge the circumstantial inadequacy of 37.071(b)(2) to accomplish the mandate of Lockett and its progeny, a majority of this Court has blithely said, time and again, that in considering whether to impose a death sentence the jury must be allowed to consider whatever evidence of mitigating circumstances the defense can bring before it. But they also have repeatedly denied the utility, much less necessity, of informing the jury that they may so consider that evidence.

If we are to ensure the constitutionality of 37.071, we must not only give lip service to broadly interpreting it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence.

It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings of Lockett and Eddings until the defendant affirmatively proves the contrary!

The defendant is entitled to jurors who will consider all mitigating circumstances. Rather than rely on speculation and assumptions, as does the Court today, defense counsel would be advised to rely on prospective jurors' promises to give consideration - independent of the narrow special issues - to

whatever mitigating circumstances the defendant may adduce for the purpose of deciding whether "mercy" is appropriate in the case. Counsel should take the responsibility upon themselves to inform the jurors of the holdings of Lockett and Eddings which constitute a part of "the law applicable to the case upon which the defense is entitled to rely. . . as mitigation. . . of the punishment," and exercise challenges for cause to jurors who cannot follow them. Article 35.16(c)(2), V.A.C.C.P.[4/] If the Court is sincere in its intentions to comply with Lockett and its progeny, such a procedure should be welcomed with open arms.

Because a majority do not evince that intention today, I dissent.

CLINTON, Judge

(Delivered September 19, 1984)

EN BANC

PUBLISH

Teague, J., and Miller, J., join

[4/] Counsel should also, of course, request an instruction on mitigating circumstances.

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 68,889 styled:

DARRYL ELROY STEWART, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

the judgment of the 184th. Judicial District Court of Harris County, Texas was AFFIRMED on September 17, 1984 and the Motion For Leave To File Appellant's Motion For Rehearing was denied on February 6, 1985.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR LEAVE TO FILE MOTION FOR REHEARING, this cause was disposed of by this Court on February 6, 1985, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas, this the 14th. day of February, A. D. 1985.

THOMAS LOWE, Clerk of the
Court of Criminal Appeals
of Texas

APPENDIX
"B"

30 day = to stay of mandate
Feb 12, 1985
TD

NO. 68,889

FEB 12 1985
RECEIVED
THOMAS F. LOWE
CLERK

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

DARRYL ELROY STEWART,
APPELLANT

VERSUS

THE STATE OF TEXAS,
APPELLEE

APPELLANT'S MOTION TO STAY OR RECALL THE MANDATE

The Appellant, Darryl Elroy Stewart, files this Motion to stay the execution of the mandate of affirmance or, in the alternative, to recall the mandate of affirmance in this cause, pending the filing and determination of a timely petition for writ of certiorari to the Supreme Court of the United States, or, in the alternative, for a period of thirty (30) days in which to apply to a Justice of that Court for a stay of execution pending the filing and determination of a petition for writ of certiorari.

I

The Appellant was convicted of the offense of capital murder and the jury assessed his punishment at death.

II

The Appellant will diligently prepare and file in the Supreme Court of the United States a timely petition for a writ of certiorari in this cause.

III

The jurisdiction of the Supreme Court of the United States

to review the judgment of this Court by writ of certiorari is derived from 28 U.S.C., Sec. 1257(3), Appellant having asserted in his direct appeal the deprivation of rights secured by the Constitution of the United States.

The Appellant's petition for writ of certiorari is not frivolous and will raise a number of substantial federal constitutional issues of which this Court has judicial knowledge.

III

Unless a stay is granted, the mandate of this Court will issue, an execution date will be set, and the Appellant, will be subject to execution without having the opportunity of presenting these substantial constitutional issues.

IV

Under similar circumstances this Court has, in previous capital cases, granted stays pending final disposition of certiorari petitions in the Supreme Court. See Denney v. State, 558 S.W.2d 467 (Tex.Cr.App.1977); Order of February 6, 1978.

WHEREFORE the Appellant, Darryl Elroy Stewart, prays that the issuance of the mandate in this cause be stayed pending the filing and determination of a timely petition for writ of certiorari in the Supreme Court of the United States, or, in the alternative, for a period of thirty (30) days.

Respectfully submitted

Will Gray

Will Gray
TBA No. 08339000
2038 Lexington Street
Houston, Texas 77098
(713) 759-0585

CERTIFICATION

I certify that I mailed a copy of this Motion to Harris County District Attorney John Holmes, 201 Fannin Street, Attention Appellate Section, Houston, Texas, 77002, and to Attorney General of Texas Jim Mattox, Attention Enforcement Division, Supreme Court Building, P. O. Box 12548, Austin, Texas 78711, on February 11, 1985.

Will Gray

Will Gray